Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SUSAN V. DIXON,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF NEW MEXICO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a University arbitrarily disregard its own policies and procedures mandated by the Family Education Rights and Privacy Act (FERPA) without remedy to an aggrieved party under 42 U.S.C. § 1983.

Does depression constitute an impairment affecting major life activities under the Americans with Disability Act and Rehabilitation Act (ADA).

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Susan V. Dixon is an individual currently residing in Harris County, Texas; Ms. Dixon has no corporate affiliations.

Respondent

Respondent Regents of the University of New Mexico is the governing body of the University of New Mexico and the University of New Mexico School of Medicine, under the laws of the State of New Mexico.

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OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is not reported. A copy of the Order and Judgment is included in the Appendix at Appendix A at 1a. The Order filed November 1, 2000, of the Tenth Circuit revising the opinion of October 6, 2000 is included in the Appendix at Appendix B at 12a. The Opinion of the District Court for the District of New Mexico is not reported. A copy of the Memorandum Opinion is included in the Appendix at Appendix C at 25a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment on October 6, 2000. Petitioner filed a timely Petition for Rehearing which the United States Court of Appeals in an Order filed November 1, 2000, granted in part. The Tenth Circuit issued a revised order and judgment modifying the language contained in the October 6, 2000 Order and Judgment regarding a private cause of action under the Family Education Rights and Privacy Act. The Court however upheld the District Court's grant of summary judgment. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 (1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V - Due Process Clause

No person shall be . . .deprived of life, liberty or property, without due process of law . . .

U.S. Const. Amend. XIV - Due Process Clause

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be labile to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

20 U.S.C. § 1232 g (a)(2)

No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation to the parents respecting the content of such records.

34 C.F.R. 99.21 (a) - Under what conditions does a parent or eligible student have the right to a hearing?

An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student. . . .

34 C.F.R. 99.22 - What minimum requirements exist for the conduct of a hearing?

The hearing required by Sec. 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) the hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under Sec. 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

42 U.S.C. § 12132 - Americans with Disabilities Act

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

29 U.S.C § 794 (a) - Rehabilitation Act

No otherwise qualified individual with a disability in the United States as defined in [705(20)] of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . "

STATEMENT OF THE CASE

Petitioner successfully completed her first two years of medical school at the University of New Mexico (UNM) School of Medicine. She began her third year of studies in 1995. She successfully completed her Internal medicine and psychiatry rotation. However, because of emotional difficulties associated in part with her mother's diagnosis of cancer, Ms. Dixon had problems completing the rotation in obstetrics and gynecology. The student evaluation from ob-

gyn noted that her "major problems seem to be noncognitive". The evaluation noted that "[h]er behavior was often rather inappropriate . . . overly emotional and anxious. . . Which . . . seriously impaired her performance." Finally, the evaluation recommended "psychological evaluation and therapy."

As a result, Petitioner was required to take a six month leave of absence to deal with these "emotional problems". Ms. Dixon requested permission to return to her studies in late September, 1995. Her therapist wrote a letter of support indicating that she had been "involved in twice weekly psychotherapy." The therapist further noted that she was taking the antidepressant Zoloft.

Petitioner was allowed by the Medical School Committee on Student Evaluations and Promotions II (CSPE II), to continue with certain conditions. First, she was required to continue with therapy. Secondly, the School of Medicine would request periodically that Petitioner's therapist reassure the School that she was "continuing to make progress in [her] therapy sessions".

Petitioner began taking rotations again in October, 1995. She successfully completed the rotation in Internal medicine, pediatrics, surgery, and family medicine. She began her rotation in ob-gyn in July, 1996. Ms. Dixon requested that the School allow her to take the rotation at a different hospital than UNM due to the difficulties she had had during the first rotation. Other students had been allowed to take the rotation at Presbyterian hospital in Albuquerque. However, Ms. Dixon's request was denied. In addition, Ms. Dixon requested by telephone that the Clerkship Director discuss providing a bed to sleep on during the twenty-four hour on-call periods that Ms. Dixon was expected to endure. The

clerkship director refused to return the telephone call or otherwise respond to this request.

Despite the past difficulties, Petitioner was able to complete the required components of the program. There were four parts needed to pass the rotation. The student must receive at least a 2.0 in each of the components in order to receive a passing grade. The clinical evaluation consisted of subjective feedback from various faculty encountered during the rotation. The faculty evaluated the student's interaction with staff, students, faculty and patients. The Clerkship Director would then taken the feedback and synthesize the information into a grade. In addition, the student was expected to complete the OSCE. The student interacted with patients feigning illness. The student was expected to examine and diagnose the various patients. Thirdly, the student was expected to complete an oral presentation within the field of ob-gyn. Finally, the student was required to write and pass a written examination at the end of the rotation.

Petitioner received a 2.61 in the clinical evaluation; 3.25 in the OSCE; and 3.0 in the oral presentation. She failed her first attempt at the final written examination. However, she was allowed to go on to her next rotation (neuropsychiatry). All students were allowed to rewrite the final examination in ob-gyn if they were unsuccessful the first time. Petitioner rewrote the final examination and received a passing grade.

Towards the end of the rotation there was a disagreement that the ob-gyn department later used as a pretext to expel Petitioner for alleged "unprofessional behavior." Petitioner had not been present the morning of the oral presentations because of a therapist's appointment. The Medical School had agreed to allow her leave to make these

appointments. Other students unaware of Petitioner's situation angrily accosted her and yelled at her for not being at their presentations during the morning. Ms. Dixon began to cry and left the room to report the incident to the ob-gyn department secretary. After composing herself she returned to the room and completed her oral presentation. Nobody from the Department of ob-gyn ever discussed the incident at the time of its occurrence (August 15, 1996). Indeed, she was allowed to continue her next rotation and retake the final examination without comment.

It was not until November 26, 1996 that Ms. Dixon was asked to come to the office of the CSPE II chair. She was not informed as to what the nature of the meeting was other than to discuss her status. She was told at that time that she was being dismissed for "global issues". The chairman refused to identify what he meant. Apparently, the CSPE II had already met at a retreat on Saturday November 22 (without notice to or the presence of Ms. Dixon) and made the decision to expel Ms. Dixon for alleged "unprofessional behavior".

Ms. Dixon requested that she be given an opportunity to discuss the matter with the CSPE II. On December 3, 1996, the CSPE II met. No written notice was given to Ms. Dixon of the items that were to be brought up. In addition, none of the protections allowed in the School's own due process statement were followed. That is, Ms. Dixon was not allowed to question witnesses, bring her own witnesses, review documentary evidence, receive information as to what rules and procedures were to apply. The Committee "consensus" was to dismiss Ms. Dixon permanently on the basis of alleged "unprofessional behavior." The School of Medicine Registrar noted on a change of status form sent to the American Medical Association and the Association of

Medical Colleges, that Ms. Dixon was dismissed for "non-academic reasons."

An appeal to the Education Council was made after the CSPE II action. The Education Council met on February 18, 1997. Again, Ms. Dixon was not given any advanced notice of what rules and procedures would apply. Nor was she given an opportunity to question the sole witness, the CSPE II Chairman. She was not allowed to present her own live witnesses, or review the documentary evidence to be used. The CSPE II Chairman had no personal knowledge of any allegations. However, he "testified" Ms. Dixon "was dismissed . . . because she failed another rotation [ob-gyn] and because there were disruptive events in violation of that original contract coming back."

Despite repeated request for her final grade from the ob-gyn rotation, Petitioner was not given her grade in ob-gyn until the Education Council meeting. Despite the fact that she had successfully completed all four components of the ob-gyn clerkship she received a grade of "unsatisfactory". The Education Council voted to uphold the decision of the CSPE II. However, the Education Council wrote a secret letter to the University attorney outlining its numerous concerns regarding the expulsion of Petitioner. In addition, the Education Council outlined in the same letter other systemic problems involving grading within the School of Medicine.

The Education Council in its findings of fact (which were not provided to Petitoner until she instituted this law-suit) indicated that it was "unconscionable" for the ob-gyn Department to withhold Petitioner's final grade until the time her appeal was to be heard. "The evaluation form used for every other student should have been afforded [Petitioner] long before this date." The Education Council indicated that

the ob-gyn Department was unwilling to fail her for any "unprofessional behavior." As such, the Education Council stated that the Department should have given her a passing grade upon her successful retake of the final examination. The council further wrote "[a]ll students should be treated in the same manner with regard to their evaluations, grades, and forms used in their academic records and transcripts." Nevertheless, the Education Council found that "[Petitioner's] emotional instability and her unprofessional demeanor" prevented her from continuing as a medical student.

Petitioner requested a rehearing before a new appeal panel because the CSPE II chairman spoke with the Education Council outside Petitioner's presence during its deliberations! In addition, Petitioner was prevented by the Chairperson of the Education Council from making a full presentation but was cut off. In the alternative, Petitioner requested "an independent review" by the Dean.

The Dean denied Petitioner's request for a new hearing. Instead, he undertook an ex parte review of written documents and spoke to three different individuals (outside Petitioner's presence). The Dean claimed in his March 20, 1997 letter that because of "failure to satisfactorily remediate the Ob/Gyn clerkship and on (sic) your continued poor academic performance, you were appropriately dismissed by the CSPE II. . . . " The Dean never allowed Petitioner any opportunity to rebut this false allegation of poor academic performance. In addition, the Dean was also incorrect in alleging Petitioner had failed to "satisfactorily remediate the Ob/Gyn clerkship". Petitioner passed all four components of the rotation and should have received a passing grade.

On June 17, 1998, Petitioner filed a complaint for violation of civil rights pursuant to 42 U.S.C. § 12101

(ADA); violation of civil rights pursuant to 29 U.S.C. § 794 (Rehabilitation Act); violation of civil rights pursuant to 42 U.S.C. § 1983; breach of contract; and permanent injunction. The breach of contract claim was dismissed without prejudice because of Eleventh Amendment immunity by agreement of the parties. The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §§ 1331 and 1337 because the case presented a federal question arising under the Americans with Disabilities Act, Rehabilitation Act and 42 U.S.C. § 1983. Respondent filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The district Court granted the motion and entered summary judgment on July 23, 1999. (Appendix C, 25a.)

Petitioner filed a timely appeal with the Court of Appeals for the Tenth Circuit. On October 6, 2000 the Court of Appeals affirmed the District Court's judgment. (Appendix A, 1a.) Petitioner requested a Panel Rehearing. The Request was granted in part and issued a revised order and judgment revising language in footnote four related to a private cause of action under the Family Education Rights and Privacy Act (FERPA). The Order was filed November 1, 2000. (Appendix B, 12a.)

ARGUMENT FOR GRANTING WRIT

Argument 1 - Petitioner has a FERPA claim under 42 U.S.C. § 1983

The District Court in its memorandum opinion dismissed Ms. Dixon's claim under 42 U.S.C. § 1983, stating ". . . the School of Medicine's actions or omissions may support . . . an administrative claim under FERPA, they do not rise to the level of a constitutional procedural due process violation." (Appendix C, 40a.) The District Court was

apparently under the misimpression that a claim could not be brought under 1983 for a violation of the FERPA. However, courts have repeatedly stated that "a violation of FERPA may be the basis for a civil rights lawsuit under 42 U.S.C. § 1983. . . . " *Faivo v. Owasso Indep. Sch. Dist.* 220 F.2d 1200 (10th Cir. 2000); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990) [an action under 42 U.S.C. 1983 may be premised on an alleged violation of FERPA rights]. Nor was Petitioner required to exhaust administrative remedies as the District Court seemed to suggest. *Krebbs v. Rutgers*, 797 F. Supp. 1246 (D.C.N.J. 1992). [FERPA does not require exhaustion of administrative remedies before an aggrieved party may assert a 1983 claim premised on FERPA violations].

The Court of Appeals for the 10th Circuit recognized that "certain violations of FERPA provide a basis for a civil rights lawsuit under 42 U.S.C. § 1983 . . . . " (Appendix B, 23a.) However, the Court of Appeals inexplicably and without rationale ruled" . . . that, in this case, Ms. Dixon has no actionable FERPA-related claim." FERPA requires the secretary to promulgate rules regarding the process allowed to a student contesting his or her academic record. 20 U.S.C. § 1232. Under FERPA regulations the Petitioner should have been given written notice of the date, time and place of the hearing. 34 C.F.R. 99.22(b) However, this simple requirement was not followed at the November 26 meeting with the Chairman of the CSPE II. The decision had already been made to expel Petitioner for alleged unprofessional behavior. Incredibly, the Chairman of CSPE II chaired the December 3, 1995 meeting of the CSPE II even though he had already pronounced the expulsion. This procedure again violated 34 C.F.R. 99.22 (c). Petitioner was denied an attorney at all stages of the proceedings. In fact, she was told

she could not have one present, in violation of 34 C.F.R. 99.22(d).

The Education Council meeting on February 18, 1997 violated the regulations under FERPA. Petitioner had no opportunity to challenge the correctness and accuracy of her final grade in ob-gyn until the time of the Education Council meeting. She had repeatedly requested her final grade in ob-gyn before February 18 but was met by a sullen and stubbom silence. At the meeting of the Education Council, Petitioner was provided for the first time a copy of the final grade in ob-gyn. In *Lewin v. Medical College of Hampton Roads*, 910 F.Supp. 1161, affirmed 131 F. 3d 135 (E. D.Va. 1996), the Court held that an expelled medical student had a valid cause of action. He claimed he was denied an opportunity to challenge an alleged scoring error in a pharmacology examination and a hearing in accordance with FERPA and its implememing regulations.

In the present case Petitioner's rights under FERPA were violated. First, Petitioner was not given advance notice of the time, date and place of the hearing reasonably in advance of the hearing. 34 C.F.R. 99.22 (b). Secondly, Petitoner was not given "full and fair opportunity to present evidence relevant to the issues". 34 C.F.R. 99.22(d). Petitioner was cut off in mid-sentence by the Chairperson while she was attempting to make her presentation. She was not allowed to bring any live witnesses. She was not allowed to have an attorney assist her in her presentation. The only witness was the chairperson of the CSPE II. He did not have any personal knowledge of any of the allegations and merely recited opinion or hearsay information. Incredibly, the chairperson of the CSPE II stayed in the room as the Education Council deliberated! Petitioner was required to wait outside, a violation of 34 C.F.R. 99.22 (d) and (f).

The final grade in ob-gyn was inaccurate and misleading. Petitioner passed all four components of the rotation yet was given an "unsatisfactory". In addition, there are several clerical errors in the student evaluation. Petitioner received a "good"-3.0 on a 4 point scale for her oral presentation instead of satisfactory which was noted in the final grade. The evaluation should have been on the standard student evaluation form instead of a letter to the Registrar. Petitioner received a passing grade on the final written examination and should have received a satisfactory instead of marginal.

A student's grades are inaccurate and misleading "if they do not reflect what the grader intended or if they are mathematically incorrect." *Tarka v. Cunningham*, 917 F. 2d 890, 891 (5th Cir. 1990). Here the grade of "unsatisfactory" was mathematically incorrect. Petitioner passed the clinical evaluation, OSCE, oral presentation, and final written examination in ob-gyn. The Education Council found that the ob-gyn Department should have passed Petitioner upon her successful retaking of the final examination.

If the Department had wished to remedy any disciplinary problems it was required to use non-cognitive forms. However, non-cognitive forms (to report behavioral problems) were never filed regarding Petitioner during the ob-gyn rotation from July through August, 1996. In fact, no non-cognitive forms were turned in complaining of alleged "unprofessional behavior" in any of the rotations taken by Petitioner in 1995-6. Indeed, the clerkship Director, during and up to the end of the rotation believed that things were going well. If the ob-gyn Department was so concerned regarding alleged "unprofessional conduct" there was a means to remedy the situation administratively. Instead, the Department chose to give an inaccurate and misleading final

grade in lieu of following its own administrative proceedings related to unprofessional behavior. Petitioner was allowed to continue with her next rotation in neuropsychiatry without protest from the ob-gyn Department.

The decision of the Education Council was to uphold the decision of the CSPE II to expel Petitioner on the basis of alleged "unprofessional behavior." The Education Council did not include a "summary of the evidence and the reasons for the decision" to the Petitioner in violation of 34 C.F.R. 99.22(f). It was only after filing a law-suit against the Respondent that the findings of fact made to the University counsel were provided.

After filing a civil law-suit, Petitioner became aware that the Education Council thought it was "unconscionable" to deny a student her final grade until the very time of her appeal to the Education Council. The Education Council further found that if the ob-gyn department were not willing to pass Petitioner upon her successfully taking the final written examination for a second time, then the Department should not have offered the opportunity to take the examination a second time.

The Education Council found systemic problems with the ob-gyn Department grading procedures. Incorrect grading procedures were noted: "[a]ll Phase II grading procedures must be standardized." Further, the Education Council found "that written narratives, checklists at the top of the evaluation form and grades should all agree. The Education Council went on that "[o]therwise, the narrative, grades or checklists alone are ambiguous, conflicting, and do not provide the institution with the documentation needed."

The Dean in his decision letter of March 20, 1997 dismissed Petitioner's request to remedy the unfair and illegal procedures used at the February 18, 1997 Education Council meeting. That is, failure to allow Petitioner an attorney of her own choosing; failure to allow Petitioner to bring witnesses in her defense; failure to provide in advance of the hearing what evidence was to be used against her; failure to give a final grade until the time scheduled for the Education Council meeting; failure to provide an accurate and correct final grade; failure to provide Petitioner a written summary of the evidence and the reasons for the Education Council's decision; and failure to recognize the harm done to the integrity of the decision by allowing the CSPE II chairperson in the room while the Education Council deliberated! Ex parte presentation of evidence during an administrative hearing is a denial of due process. *University of Texas Medical School v. Than*, 901S.W.2d 926 (1995).

The Dean introduced alleged academic deficiencies in his March 20, 1997 letter to Petitioner upholding the expulsion. Despite the fact that CSPE II had expelled Ms. Dixon for alleged unprofessional behavior, the Dean used extraneous reasoning regarding alleged academic problems in violation of 34 C.F.R. 99.22 (f). Further, Petitioner was not given any opportunity to challenge these allegations of academic deficiencies.

The Respondent had adopted administrative procedures that are required under the regulations promulgated under FERPA. However, the Respondent failed to follow its own procedures that were required by the express terms of the FERPA regulations. 34 C.F.R. 99.22. "FERPA creates an interest that may be vindicated in a section 1983 action." *Fay v. South Colonic Cent. School Dist.*, 802 F.2d 21, 33 (2nd Cir. 1986).

Violation of FERPA may be the basis for a civil rights claim under section 1983. A cause of action may be asserted under 1983 even though FERPA does not provide for a private cause of action. *Doe v. Knox County Bd. of Educ.*, 918F. Supp. 1811 (E.D.Ky. 1996).

The 10th Circuit Order assumed that Petitioner was dismissed from medical school for "academic reasons". (Appendix B, 23a.) As such, due process does not require a hearing for an academic dismissal. However, the Court misconstrued the burden of proof in a summary judgment hearing. The evidence must be viewed in a light most favorable to the nonmoving party. *Utility Elec. Supply, Inc. v. ABB Power T & D Co., Inc.*, 36 F.3d 737(8th Cir. 1994). Here, the opinion ignores the fact that the December 3, 1996 minutes of the CSPE II meeting stated that Petitioner was being dismissed for unprofessional conduct. The December 9 change of status form prepared by the Registrar indicated that Petitioner was being dismissed for nonacademic reasons. The Court impermissibly weighed evidence. *Fernbach v. Dominick's Finer Foods*, 936 F. Supp 467 (N.D. Ill. 1996). Petitioner had the right to the protections afforded in disciplinary proceedings. *Dixon v. Alabama State Bd. Of Ed.* 294 F.2d 150 (5th Cir. 1961).

Even assuming for the purposes of argument that the expulsion was "academic" this does not end the inquiry . If an academic dismissal is motivated by bad faith or ill will unrelated to academic performance, then an actionable deprivation of due process is proved. *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986); *Ikpeazu v. University of Nebraska*,775 F.2d 250 (8th Cir. 1985); *Alcorn v. Vaksman*, 877 S.W. 2d 390, 397 (Tx. App. 1994).If there is evidence of bad faith in dismissing a student for academic reasons, then the deferential standard applied to the review of student

dismissal cases will not apply. *Id.* In the present case the 10th Circuit did not take into consideration the findings of fact from the Education Council. The Respondent's own Education Council found evidence of bad faith-withholding the final grade until the day of the Education Council meeting; allowing Petitioner to retake the final ob-gyn examination and then not passing her, despite the fact she received a passing grade.

Argument 2 - The Court erred in holding that Petitioner did not have a disability within the meaning of the Americans with Disability Act and Rehabilitation Act.

The Petitioner was afflicted with chronic on going depression. Depression has been considered a disability under the ADA. *Krocka v. Riegler*, 958F. Supp. 1333 (E.D.Ill. 1997). Her therapist compared the Petitioner's depression as something akin to diabetes. Depression affected Petitioner's ability to interact with faculty, residents, staff and fellow students. Petitioner's depression further interfered with her ability to function intellectually- she was "disorganized and distracted."Both the First and Eight Circuit have ruled that learning is a major life activity. *Bercovitch v. Baldwin School Inc.* 133 F.3d 141, 155 (1st Cir. 1998); *Amir v. St. Louis University*, 184 F.3d 1017, 1027 (8th Cir. 1999). The depression interfered with her ability to take care of her hygiene, grooming, learning and working. *Sutton v. United Airlines, Inc.*, __U. S.__, 119 S.Ct.2139, 3145, L.Ed. (1999). An impairment need not affect a public or economic character. *Bragdon v. Abbot*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed. 2d 540 (1998). Under 42 U.S.C. § 12102 (2)(A), Petitioner had a mental impairment substantially limiting "one or more of the major life activities of such individual."

The Tenth Circuit's opinion claimed that "there is no evidence that the University regarded her as having a disability." (Appendix B, 20a.) The record does not support this ruling. First, when Petitioner first attempted the rotation in ob-gyn in January-February 1995, the Clerkship Director noted in the student evaluation that Petitioner's major problems were "noncognitive". He further noted that Petitioner's "affect always tended to be somewhat histrionic." The Clerkship Director further recommeded "psychological evaluation and therapy" for Petitioner. One resident claimed that Petitioner's problems appeared to be akin to bi-polar disorder.

The Clerkship Director noted during her second attempt in ob-gyn that Petitioner was allegedly "emotionally labile." "This of course interfered with her functioning." He noted alleged "problems interacting with her peers" and allegedly "somewhat emotionally unstable." The Respondent required Petitioner take a six month leave of absence and seek therapy.

The CSPE II required as a condition of Petitioner's continuation in medical school that she continue in therapy. The School was aware that Petitioner was taking Zoloft. The Education Council indicated in its findings of fact to the University attorney that Petitioner's alleged "emotional instability" rendered her unfit to continue in the medical school.

The ob-gyn Clerkship Director made it clear in his deposition, that Petitioner's prior emotional problems during her first rotation in ob-gyn "colored" the faculty's evaluation of Petitioner during the second rotation. There was "animosity" created towards Petitioner as a result of the behavioral problems experienced in the first rotation. The

ADA forbids discrimination against a person who has a record of, or is regarded as having an impairment but who may at present have not actual incapacity at all. *Johnson v. American Chamber of Commerce Publishers Inc.*, 108F.3d 818 (7th Cir. 1997); *Sutton v. United Airlines Inc.* U.S. 119 S.Ct. 2139, 2150, L.Ed.2d (1999) ["The determination of whether an individual has a disability is not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."]. Whether or not an individual has a disability under the ADA is an individualized inquiry. *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).

Petitioner was regarded as having a disability by Respondent. The United States Supreme Court in *Sutton v. United Airlines Inc.*, *supra.*, noted that even if an individual does not have an actual disability, the individual can be "regarded as" being disabled. *Id.* 2149-50. There are two ways an individual may fall under this "regarded as" category. If the individual is mistakenly believed to have "a physical impairment that substantially limits one or more major life activities." Or, if the individual is mistakenly believed to have "an actual non-limiting" impairment substantially limiting one or more major life activities. *Id.* 2150. 42 U.S.C. § 12102 (2)(B)(C); *Albertsons, Inc. v. Kirkingburg*, ___ U.S. ___, 119 S.Ct. 2162, 2167, ___ L.Ed. ___ (1999).

Argument 3 - The Court erred in holding Petitioner did not have a disability under the Rehabilitation Act

Under the Rehabilitation Act, no otherwise qualified individual may be discriminated against in any program receiving federal financial assistance. 29 U.S.C. § 794 (a). An

individual afflicted with depression has been deemed to be an "individual with a handicap" under the Rehabilitation Act where depression and medication regime interfered with the person's ability to arrive at work in a timely fashion. *Guiee-Mills v. Derwinski*, 967 F.2d 794, 797 (2nd Cir. 1992). In the present case, the Petitioner's depression interfered with both cognitive and non-cognitive functions. The Respondent admitted as much in the first student evaluation in ob-gyn.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with the interpretation of the FERPA given by other Circuits. Petitioner may bring an action under 1983 to challenge the accuracy and correctness of her final grade in ob-gyn. There were numerous clerical and mathematical errors in the final grade. The Respondent failed to follow the required procedures of FERPA and its own policies and procedures adopted pursuant to FERPA.

The Court of Appeals also erred in concluding that Petitioner did not have an impairment that interfered with a major life activity under the ADA and the Rehabilitation Act. The Petition for a Writ of Certiorari should be granted and the decision upholding the summary judgment reversed.

Respectfully Submitted:

/s/_____
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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed October 6, 2000]

No. 99-2245
(D.C. No. CIV-98-725-SC/DJS)
(D. N.M.)

S.V. DIXON,
Plaintiff-Appellant,

v.

REGENTS OF THE UNIVERSITY OF NEW MEXICO,
Defendant-Appellee.

ORDER AND JUDGMENT*

JUDGES: Before **BRORBY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

After being expelled from the University of New Mexico School of Medicine, plaintiff S.V. Dixon filed this action alleging that the Regents of the University of New Mexico (the University) violated her rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-213 and the Rehabilitation Act, 29 U.S.C. §§ 701-96. She also made claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, asserting procedural due process, substantive due process, and equal protection violations. The district court granted defendant's motion for summary judgment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Ms. Dixon's academic record shows that she had difficulty in gaining admittance to the medical school, in fulfilling course requirements, and in passing required national examinations. She eventually completed her second year of course work and, in May 1994, began phase II of medical school in the University hospital, consisting of clinical rotations focusing on various medical specialties. Although Ms. Dixon's performance was satisfactory in other third-year rotations, she failed the obstetrics-gynecology rotation (reputedly a high-stress endeavor) for performance and behavioral problems and also because she did not pass the final examination.

In April 1995, the University required Ms. Dixon to take a leave of absence, during which time she sought treatment for emotional difficulties. Later that year, she requested reinstatement, submitting a letter from her treating therapist indicating the belief that Ms. Dixon "ha[d] recovered from her episode of depression" and was "continuing to work on other personal issues." Appellant's App. at 268. The therapist thought that Ms. Dixon, if re-admitted, would "function better academically," "be more capable of functioning interpersonally on clinical rotations," and could now "manage the academic and interpersonal stressors." Id.

The Committee on Student Promotions and Evaluations II allowed Ms. Dixon to return in September 1995, but required her to re-take all her third-year rotations and continue treatment with her therapist. The academic year following reinstatement, Ms. Dixon passed rotations in family medicine, pediatrics, and internal medicine. As for the obstetrics-gynecology rotation, the supervising physician and other members of the department noted a general improvement in her performance, but they continued to have serious reservations about her ability to function in a clinical setting. Ms. Dixon again failed the final examination. In spite of misgivings about Ms. Dixon's performance, the supervising physician permitted her to take the examination a third time. On this attempt, she passed with a marginal grade.

On November 26, 1996, a Committee on Student Promotions and Evaluations II convened to discuss Ms. Dixon's performance problems and her potential dismissal from medical school. On that day, for the first time, Ms. Dixon was informed that she had passed the written examination in obstetrics-gynecology on her third try. At the

meeting, Ms. Dixon was not permitted to question witnesses or present witnesses of her own, but both she and her therapist testified. The Committee recommended that Ms. Dixon be expelled because the "totality of [her] poor academic performance is such that the Committee found [she was] an unsuitable candidate for the MD degree and that [she did] not possess the qualities and skills necessary to enable [her] to be a safe and effective practitioner of medicine." Appellant's App. at 257. The letter informing Ms. Dixon of the decision also notified her of appeal rights.

Ms. Dixon's appeal letter was untimely; however, the Dean of the medical school allowed it to proceed to the next level, the Education Council. Ms. Dixon made both written and oral presentations before that body. Although the Education Council found fault with the way the Department of Obstetrics-Gynecology dealt with her final examination, it upheld the Committee's decision.

Ms. Dixon then appealed to the Dean, alleging that she had not been provided a fair and impartial hearing. The Dean reviewed Ms. Dixon's "overall academic and non-cognitive performance over the five years that [she had] been pursuing [her] medical education." Appellant's App. at 235. He also met with Ms. Dixon and interviewed some of the individuals she identified as being familiar with her work. The Dean made the ultimate decision to expel Ms. Dixon based on her "failure to satisfactorily remediate the OB/Gyn clerkship and on [her] continued poor academic performance." Id.

Ms. Dixon then filed this lawsuit, arguing that the University had denied her substantive and procedural due process at all levels and failed to accommodate her emotional

problems, as required by the ADA and Rehabilitation Act. The district court entered summary judgment in favor of the University, holding that plaintiff could not prove (1) that she was entitled to the protection of the ADA and Rehabilitation Act because she could not prove she had a statutorily-cognizable disability or handicap; or (2) that her constitutional rights had been violated in any way. Upon the district court's entry of summary judgment, Ms. Dixon appealed, arguing that the district court erred in analyzing her claims.

DISCUSSION

We review de novo the district court's decision granting summary judgment and apply the same legal standard as the district court. See Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1313 (10th Cir. 1999). Summary judgment is appropriate on a record demonstrating that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[W]e view the factual record and inferences therefrom in the light most favorable to the nonmoving party." Bullington, 186 F.3d at 1313.

Disability-related claims

As a threshold matter, we must address the University's motion for leave to file a supplemental memorandum in order to assert that it has Eleventh Amendment immunity from an ADA claim. See Buchwald v. University of N.M. Sch. of Med., 159 F.3d 487, 494 n.3 (10th Cir. 1998) (noting that the University of New Mexico School of Medicine and university regents are "arms of the state" and entitled to Eleventh Amendment immunity). The

University's argument was based on the Supreme Court's holding that the Eleventh Amendment precludes claims under the Age Discrimination in Employment Act (ADEA) against the states. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650 (2000). In light of the Kimel decision, this court has reconsidered our prior determination in Martin v. Kansas, 190 F.3d 1120, 1127-28 (10th Cir. 1999), that the ADA abrogated the states' Eleventh Amendment immunity. See Cisneros v. Wilson, No. 98-2215, 2000 WL 1336658 (10th Cir. Sept. 11, 2000). At the conclusion of its analysis, a panel of this court concluded that, unlike the ADEA, the ADA amounted to a valid abrogation of Eleventh Amendment immunity. See id. at *16. It therefore reaffirmed the Martin holding. See id.

"'We are bound by the precedents of prior panels [of this court] absent en banc reconsideration or a superseding contrary decision by the Supreme Court.'" United States v. Malone, 222 F.3d 1286, 1294 (10th Cir. 2000) (quoting In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)).[1] Because Cisneros holds that the states are not immune from ADA claims, we proceed to the merits of Ms. Dixon's ADA claim.

Ms. Dixon argues that the district court erred in concluding that she did not have a disability as defined by the ADA. See Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1230 (10th Cir. 1999) (holding that the

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[1] We note, however, that the Supreme Court has granted certiorari on the Eleventh Amendment immunity issue. See University of Ala. at Birmingham Bd. of Trustees v. Garrett, 120 S. Ct. 1669 (2000).

disability determination is a matter of law for the court to decide).[2] The Supreme Court has developed a three-step process for making the relevant determination. The plaintiff must (1) identify an impairment recognized by the ADA; (2) state the relevant major life activity as that term is defined under the ADA; and (3) show that the impairment substantially limits the major life activity. Poindexter, 168 F.3d at 1230 (citing Bragdon v. Abbott, 524 U.S. 624, 631 (1998)). "[A] plaintiff must articulate with precision the impairment alleged and the major life activity affected by that impairment." Id. at 1232. A general statement that the plaintiff has an impairment substantially impacting a major life activity will not suffice. See id.

Here, Ms. Dixon gives her claim of depression only vague contours and fails to articulate any particular major life activity that was affected by the asserted impairment. See Appellant's Br. at 8 (stating generally that "her depression [a]ffected ever[y] part of her life"). Furthermore, there is no evidence that the University regarded her as having a disability. The district court correctly determined that Ms. Dixon has failed to show a disability under the ADA.

Ms. Dixon also asserts cause of action under the Rehabilitation Act, which prohibits discrimination against disabled persons who are otherwise qualified for participation in programs receiving federal funding, including grants to

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[2] The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

public universities, see 29 U.S.C. § 794(a), (b)(2)(A). The Rehabilitation Act defines "disability" in the same way as the ADA. See Bragdon, 524 U.S. 624 at 629, 631. Therefore, Ms. Dixon's Rehabilitation Act claim suffers from the same flaw as her ADA claim: lack of a showing that she has a disability covered by the applicable statute.

Based on the record before us, Ms. Dixon is not entitled to the protections of either the ADA or the Rehabilitation Act. Accordingly, we need not reach any issues concerning the accommodations she wished to receive from the University.

Constitutional claims

Plaintiff asserts that she was deprived of both procedural and substantive due process. "[P]rocedural due process ensures that a state will not deprive a person of life, liberty or property" without employing "fair procedures; substantive due process, on the other hand, guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures" used. Hennigh v. City of Shawnee, 155 F.3d 1249, 1253 (10th Cir. 1998) (quoting Archuleta v. Colorado Dep't of Insts., Div. of Youth Servs., 936 F.2d 483, 490 (10th Cir. 1991) (alteration in Archuleta)).

For both types of claims, a plaintiff must show possession of an interest to which due process protection attaches. See Watson v. University of Utah Med. Ctr., 75 F.3d 569, 577 (10th Cir. 1996) (procedural due process); Clinger v. New Mexico Highlands Univ., 215 F.3d 1162, 1167 (10th Cir. 2000) (substantive due process). It has not

been "clearly established" that a plaintiff holds a "'property' or 'liberty' interest in continued enrollment at the [University of New Mexico] Medical School despite [her] academic failures." Trotter v. Regents of the Univ. of N.M., 219 F.3d 1179, 1184 (10th Cir. 2000). For purposes of the instant case, however, we assume without deciding that plaintiff has such a protected interest.

Turning to Ms. Dixon's procedural due process claim, we must determine whether she was afforded "an appropriate level of process." Watson, 75 F.3d at 577. Our review of the record reveals that she had the opportunity to present written evidence and make oral statements to the responsible university officials. "[T]he due process clause does not require that a student dismissed from a state medical school for academic reasons be given a hearing." Trotter, 219 F.3d at 1185 (citing Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978)).[3] Ms. Dixon was

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[3] The Supreme Court has observed that procedural due process requirements for students may vary depending on whether the action taken is "disciplinary" or "academic." Board of Curators, 435 U.S. at 87-90. To the extent Ms. Dixon asserts that she was entitled to the additional procedural protections that may attach to disciplinary expulsions, the argument is unavailing. In Board of Curators, the Court explained that a decision to dismiss the respondent from medical school

> rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and

accorded all the process required by the Fourteenth Amendment. [4]

For a substantive due process claim, Ms. Dixon must show that the University's actions "would shock the conscience of federal judges," or "were arbitrary or lacking a rational basis." Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 528-29 (10th Cir. 1998) (quotations omitted). Here,

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> evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 89-90. The University's decision regarding Ms. Dixon was genuinely "academic."

[4] Ms. Dixon also asserts that the University violated her procedural due process rights because it did not comply with the regulations developed under the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(a)(2)), or its own procedures. However, FERPA does not create a private cause of action, see Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986), or expand constitutional rights, Falvo v. Owasso Indep. Sch. Dist. No. I-011, 220 F.3d 1200, 1205-06 (10th Cir. Oct. 4, 2000) (concerning a privacy right contention). Moreover, a school's failure to follow its own procedures does not, in itself, give rise to a due process violation. See Trotter, 219 F.3d at 1185 (citing cases).

the University's decision to dismiss Ms. Dixon was a product of ordered professional judgment and was not shocking, arbitrary, or irrational in any way. Accordingly, she was not denied substantive due process.

CONCLUSION

For the reasons stated above, we conclude that the district court correctly entered summary judgment in favor of the University. We AFFIRM the district court's judgment. The University's motion for leave to file a supplemental memorandum is denied.

Entered for the Court

Stephen H. Anderson
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 1, 2000]

No. 99-2245
(D.C. No. CIV-98-725-SC/DJS)
(D. N.M.)

S.V. DIXON, *Plaintiff-Appellant*,	)
v.	)
REGENTS OF THE UNIVERSITY OF NEW MEXICO, *Defendant-Appellee.*	)

ORDER

JUDGES: Before **BRORBY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

This matter is before the court on petition of appellant S. V. Dixon for rehearing of this court's order and judgment filed October 6, 2000. The hearing panel grants the petition in part and issues a revised order and judgment which modifies the language of footnote four concerning a private cause of action under the Family Education Rights and

Privacy Act (FERPA).

The members of the hearing panel have considered appellant's arguments on the merits of this court's disposition of his appeal, and conclude that the original disposition was correct. Therefore, the petition for rehearing is denied on the merits. A copy of the corrected order and judgment is attached.

Entered for the Court
Patrick Fisher, Clerk of Court

By: /s/ _____
Keith Nelson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 1, 2000]

No. 99-2245
(D.C. No. CIV-98-725-SC/DJS)
(D. N.M.)

S.V. DIXON,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
REGENTS OF THE UNIVERSITY	)
OF NEW MEXICO,	)
Defendant-Appellee.	)
	)

JUDGES: Before **BRORBY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

ORDER AND JUDGMENT*

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

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not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

After being expelled from the University of New Mexico School of Medicine, plaintiff S.V. Dixon filed this action alleging that the Regents of the University of New Mexico (the University) violated her rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-213 and the Rehabilitation Act, 29 U.S.C. §§ 701-96. She also made claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, asserting procedural due process, substantive due process, and equal protection violations. The district court granted defendant's motion for summary judgment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Ms. Dixon's academic record shows that she had difficulty in gaining admittance to the medical school, in fulfilling course requirements, and in passing required national examinations. She eventually completed her second year of course work and, in May 1994, began phase II of medical school in the University hospital, consisting of clinical rotations focusing on various medical specialties. Although Ms. Dixon's performance was satisfactory in other third-year rotations, she failed the obstetrics-gynecology rotation (reputedly a high-stress endeavor) for performance and behavioral problems and also because she did not pass the final examination.

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treatment for emotional difficulties. Later that year, she requested reinstatement, submitting a letter from her treating therapist indicating the belief that Ms. Dixon "ha[d] recovered from her episode of depression" and was "continuing to work on other personal issues." Appellant's App. at 268. The therapist thought that Ms. Dixon, if re-admitted, would "function better academically," "be more capable of functioning interpersonally on clinical rotations," and could now "manage the academic and interpersonal stressors." Id.

The Committee on Student Promotions and Evaluations II allowed Ms. Dixon to return in September 1995, but required her to re-take all her third-year rotations and continue treatment with her therapist. The academic year following reinstatement, Ms. Dixon passed rotations in family medicine, pediatrics, and internal medicine. As for the obstetrics-gynecology rotation, the supervising physician and other members of the department noted a general improvement in her performance, but they continued to have serious reservations about her ability to function in a clinical setting. Ms. Dixon again failed the final examination. In spite of misgivings about Ms. Dixon's performance, the supervising physician permitted her to take the examination a third time. On this attempt, she passed with a marginal grade.

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Ms. Dixon then filed this lawsuit, arguing that the University had denied her substantive and procedural due process at all levels and failed to accommodate her emotional problems, as required by the ADA and Rehabilitation Act. The district court entered summary judgment in favor of the

University, holding that plaintiff could not prove (1) that she was entitled to the protection of the ADA and Rehabilitation Act because she could not prove she had a statutorily-cognizable disability or handicap; or (2) that her constitutional rights had been violated in any way. Upon the district court's entry of summary judgment, Ms. Dixon appealed, arguing that the district court erred in analyzing her claims.

DISCUSSION

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Disability-related claims

As a threshold matter, we must address the University's motion for leave to file a supplemental memorandum in order to assert that it has Eleventh Amendment immunity from an ADA claim. See Buchwald v. University of N.M. Sch. of Med., 159 F.3d 487, 494 n.3 (10th Cir. 1998) (noting that the University of New Mexico School of Medicine and university regents are "arms of the state" and entitled to Eleventh Amendment immunity). The University's argument was based on the Supreme Court's holding that the Eleventh Amendment precludes claims under

the Age Discrimination in Employment Act (ADEA) against the states. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650 (2000). In light of the Kimel decision, this court has reconsidered our prior determination in Martin v. Kansas, 190 F.3d 1120, 1127-28 (10th Cir. 1999), that the ADA abrogated the states' Eleventh Amendment immunity. See Cisneros v. Wilson, No. 98-2215, 2000 WL 1336658 (10th Cir. Sept. 11, 2000). At the conclusion of its analysis, a panel of this court concluded that, unlike the ADEA, the ADA amounted to a valid abrogation of Eleventh Amendment immunity. See id. at *16. It therefore reaffirmed the Martin holding. See id.

"'We are bound by the precedents of prior panels [of this court] absent en banc reconsideration or a superseding contrary decision by the Supreme Court.'" United States v. Malone, 222 F.3d 1286, 1294 (10th Cir. 2000) (quoting In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)).[1] Because Cisneros holds that the states are not immune from ADA claims, we proceed to the merits of Ms. Dixon's ADA claim.

Ms. Dixon argues that the district court erred in concluding that she did not have a disability as defined by the ADA. See Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1230 (10th Cir. 1999) (holding that the disability determination is a matter of law for the court to

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[1] We note, however, that the Supreme Court has granted certiorari on the Eleventh Amendment immunity issue. See University of Ala. at Birmingham Bd. of Trustees v. Garrett, 120 S. Ct. 1669 (2000).

decide).[2] The Supreme Court has developed a three-step process for making the relevant determination. The plaintiff must (1) identify an impairment recognized by the ADA; (2) state the relevant major life activity as that term is defined under the ADA; and (3) show that the impairment substantially limits the major life activity. Poindexter, 168 F.3d at 1230 (citing Bragdon v. Abbott, 524 U.S. 624, 631 (1998)). "[A] plaintiff must articulate with precision the impairment alleged and the major life activity affected by that impairment." Id. at 1232. A general statement that the plaintiff has an impairment substantially impacting a major life activity will not suffice. See id.

Here, Ms. Dixon gives her claim of depression only vague contours and fails to articulate any particular major life activity that was affected by the asserted impairment. See Appellant's Br. at 8 (stating generally that "her depression [a]ffected ever[y] part of her life"). Furthermore, there is no evidence that the University regarded her as having a disability. The district court correctly determined that Ms. Dixon has failed to show a disability under the ADA.

Ms. Dixon also asserts cause of action under the Rehabilitation Act, which prohibits discrimination against disabled persons who are otherwise qualified for participation in programs receiving federal funding, including grants to public universities, see 29 U.S.C. § 794(a), (b)(2)(A). The

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[2] The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Rehabilitation Act defines "disability" in the same way as the ADA. See Bragdon, 524 U.S. 624 at 629, 631. Therefore, Ms. Dixon's Rehabilitation Act claim suffers from the same flaw as her ADA claim: lack of a showing that she has a disability covered by the applicable statute.

Based on the record before us, Ms. Dixon is not entitled to the protections of either the ADA or the Rehabilitation Act. Accordingly, we need not reach any issues concerning the accommodations she wished to receive from the University.

Constitutional claims

Plaintiff asserts that she was deprived of both procedural and substantive due process. "[P]rocedural due process ensures that a state will not deprive a person of life, liberty or property" without employing "fair procedures; substantive due process, on the other hand, guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures" used. Hennigh v. City of Shawnee, 155 F.3d 1249, 1253 (10th Cir. 1998) (quoting Archuleta v. Colorado Dep't of Insts., Div. of Youth Servs., 936 F.2d 483, 490 (10th Cir. 1991) (alteration in Archuleta)).

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or 'liberty' interest in continued enrollment at the [University of New Mexico] Medical School despite [her] academic failures." Trotter v. Regents of the Univ. of N.M., 219 F.3d 1179, 1184 (10th Cir. 2000). For purposes of the instant case, however, we assume without deciding that plaintiff has such a protected interest.

Turning to Ms. Dixon's procedural due process claim, we must determine whether she was afforded "an appropriate level of process." Watson, 75 F.3d at 577. Our review of the record reveals that she had the opportunity to present written evidence and make oral statements to the responsible university officials. "[T]he due process clause does not require that a student dismissed from a state medical school for academic reasons be given a hearing." Trotter, 219 F.3d at 1185 (citing Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978)).[3] Ms. Dixon was

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[3] The Supreme Court has observed that procedural due process requirements for students may vary depending on whether the action taken is "disciplinary" or "academic." Board of Curators, 435 U.S. at 87-90. To the extent Ms. Dixon asserts that she was entitled to the additional procedural protections that may attach to disciplinary expulsions, the argument is unavailing. In Board of Curators, the Court explained that a decision to dismiss the respondent from medical school

> rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions

accorded all the process required by the Fourteenth Amendment. [4]

For a substantive due process claim, Ms. Dixon must show that the University's actions "would shock the conscience of federal judges," or "were arbitrary or lacking

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> presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 89-90. The University's decision regarding Ms. Dixon was genuinely "academic."

[4] Ms. Dixon also asserts that the University violated her procedural due process rights because it did not comply with the regulations developed under the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(a)(2)), or its own procedures. However, FERPA does not create a private cause of action, see Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986), or expand constitutional rights, Falvo v. Owasso Indep. Sch. Dist. No. I-011, No. 99-5130, 2000 WL 1472451, *3 (10th Cir. Oct. 4, 2000) Although we recognize that certain violations of FERPA provide a basis for a civil rights lawsuit under 42 U.S.C. § 1983, see id. at *6 (discussing a privacy right contention), we determine that, in this case, Ms. Dixon has no actionable FERPA-related claim. Moreover, a school's failure to follow its own procedures does not, in itself, give rise to a due process violation. See Trotter, 219 F.3d at 1185 (citing cases).

a rational basis." Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 528-29 (10th Cir. 1998) (quotations omitted). Here, the University's decision to dismiss Ms. Dixon was a product of ordered professional judgment and was not shocking, arbitrary, or irrational in any way. Accordingly, she was not denied substantive due process.

CONCLUSION

For the reasons stated above, we conclude that the district court correctly entered summary judgment in favor of the University. We AFFIRM the district court's judgment. The University's motion for leave to file a supplemental memorandum is denied.

Entered for the Court

Stephen H. Anderson
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed July 23, 1999]

No. CV 98-725 SC/DJS

S.V. DIXON,
Plaintiff,

v.

REGENTS OF THE UNIVERSITY OF NEW MEXICO,
Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant's Motion for Summary Judgment for Failure to Exhaust Administrative Remedies, filed April 9, 1999 [Doc. No. 31]; Defendant's Motion for Summary Judgment Dismissing Counts I and II of the Complaint, filed April 26, 1999 [Doc. No. 37]; Defendant's Motion for Summary Judgment on Plaintiff's Request for Declaratory and Injunctive Relief, filed April 26, 1999 [Doc. No. 41]; Plaintiff's Motion for Default Judgment, filed June 29, 1999 [Doc. No. 59]; and Plaintiff's Contested Motion to Prohibit Defendant from Calling

Witnesses, filed July 15, 1999 [Doc. No. 68]. The Court, having read the motions, memoranda, and exhibits submitted by the parties, and being apprised of the applicable law, concludes that, for the reasons set forth below, Defendant's two substantive motions should be granted. All other pending motions will be denied.

I. BACKGROUND

Plaintiff, Susan Dixon, was a medical student at the University of New Mexico School of Medicine (the School of Medicine), where she successfully completed two years of medical school, although not without substantial difficulty. In November 1994 she was promoted to the third year. During this time, Plaintiff was being treated for clinical depression. The third year requirements included rotations in internal medicine, pediatrics, surgery, OB/GYN, family practice, and neuropsychiatry. While Plaintiff Passed some of the third year rotations, Plaintiff had cognitive and noncognitive difficulties. She failed the written exam in her surgical rotation, and received an unsatisfactory grade in her OB/GYN rotation because she failed the final exam and had severe interpersonal problems with the OB/GYN department. In April 1995, the Committee on Student Promotions and Evaluations II (CSEP II) required Plaintiff to take a six-month leave of absence, to which Plaintiff agreed.

In October 1995 Plaintiff was reinstated conditionally, as provided in a letter to Plaintiff from the Chair of the CSEP II, Dr. Berthold E. Umland. Plaintiff was required to repeat the entire third year, even rotations she had passed, and was placed under special scrutiny to watch for behavioral and academic problems. Plaintiff also was required to pass all

course work for the remainder of her medical school enrollment. Plaintiff further was required to continue her therapy sessions with her therapist, Dr. Regina Carroll.

In her second time through the third year, Plaintiff passed all of the rotations, except for the OB/GYN rotation. Plaintiff passed two of the three components of the OB/GYN grade - the Objective Structured Clinical Exam (OSCE) and the clinical evaluation - but failed the written shelf-board exam. Plaintiff was given a temporary grade of no credit for the OB/GYN rotation. Plaintiff was allowed to retake the exam on October 28, 1996, and she passed. However, Plaintiff's final grade for the rotation, given on February 18, 1997 by letter, was an unsatisfactory because of alleged continued cognitive and noncognitieve problems. Evidence of Plaintiff's continued noncognitive problems included incidents on July 15, August 9, and August 15, 1996, in which Plaintiff became angry or cried.

On November 22 or 26, 1996, Plaintiff and Dr. Carroll met with Dr. Umland. At this meeting Plaintiff was informed she would be dismissed from the School of Medicine because of "global issues" concerning her performance. Plaintiff then was scheduled to meet with the CSEP II on December 3, 1996.

On December 3, 1996, Plaintiff attended the CSEP II meeting, accompanied by Dr. Carroll. At the meeting, faculty voiced concerns about Plaintiff's unprofessional behavior and cognitive abilities before and after her leave of absence. Members of the CSEP II questioned Plaintiff in response to the voiced concerns. After the CSEP II meeting, Plaintiff was notified in writing that the CSEP II had decided that she

should be dismissed from the School of Medicine for the noncognitive reasons discussed at the December 3 meeting. Plaintiff was informed her appeal fights were contained in the Student Handbook.

Plaintiff filed an untimely appeal. Nonetheless, the appeal was heard by the Education Council on February 18, 1997. Plaintiff submitted a written packet and gave an oral presentation to the Education Council. Dr. Umland presented the reasons for the CSEP II's decision. The Education Council was permitted to question Plaintiff and Umland, and both parties were allowed to summarize their positions. Plaintiff also was informed that her final grade for the OB/GYN rotation was an unsatisfactory. The Education Council upheld the CSEP II's decision to dismiss Plaintiff, and notified Plaintiff by letter of its decision and Plaintiff's right to appeal to the Dean of the School of Medicine, Paul B. Roth.

In considering Plaintiff's appeal, Dean Roth met with Plaintiff, met with individuals identified by Plaintiff, and reviewed Plaintiff's entire medical school record and the decisions of the CSEP II and the Educational Council, with the exception of the Education Council's findings of fact dated February 24, 1997. Dean Roth upheld the decision of the Education Council to dismiss Plaintiff because of her marginal academic performance over a five-year period and her noncognitive performance difficulties. Plaintiff was notified of the Dean's decision by letter dated March 20, 1997.

* * * *

Plaintiff brings this case under (1) Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, alleging that she was not afforded reasonable accommodation for her disability of clinical depression (Count I); (2) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, alleging she was not given reasonable accommodation, and that Defendants used gross misjudgment and/or bad faith in expelling her (Count II); and (3) the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging she had a protected property and liberty interest in her continued edcucation, and that she was dismissed without due process or equal protection in violation of the Fifth and Fourteenth Amendments to the United States Constitution (Count III).

II. LEGAL STANDARD

A motion for summary judgment should be granted only when there is no genuine issue of material fact, and, as a matter of law, the moving party is entitled to judgment. See Fed. R. Civ. P. 56(c). A court's job in ruling on a motion for summary judgment is not to weigh the evidence, make credibility determinations, or draw inferences from the facts, but, rather, to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 255 (1986). The inquiry a court must make is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. If a court finds that there are genuine and material factual issues, these issues should be resolved by the fact finder, and summary judgment is precluded. See id. at 248.

When ruling on a motion for summary judgment, a court must construe the facts in the light most favorable to the nonmovant. See Magnum Foods, Inc. v. Continental Casualty Co., 36 F.3d 1491, 1497 (10th Cir. 1994). All doubts must be resolved in favor of the existence of triable issues. See World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Only then does the burden shift to the nonmovant to come forward with evidence showing that there is a genuine issue of material fact. See Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991).

III. ADA AND REHABILITATION ACT CLAIMS (COUNTS I AND II)

A. Exhaustion of Remedies

Defendant seeks judgment for failure of Plaintiff to exhaust her administrative remedies under Title II of the American with Disabilities Act (ADA) (Count I) and the Rehabilitation Act (Count II). Defendant contends that before filing suit, a plaintiff first must file a charge of discrimination with a state or federal agency, and that Plaintiff failed to file such a charge with either the EEOC or the New Mexico Human Rights Commission. Plaintiff contends that exhaustion is not required for Title II ADA or Rehabilitation Act claims in the non-federal employee context.

It is well-established that exhaustion of administrative remedies is not required for Rehabilitation Act actions in the non-federal employee context. See Pushkin v. Regents of the

Univ. of Colo., 658 F.2d 1372, 1381-82 (10th Cir. 1981) (enforcement procedures of the Rehabilitation Act do not require exhaustion of administrative remedies by non-federal employees). Furthermore, other courts have held that exhaustion of administrative remedies is not required for actions brought under Title II of the ADA, which is modeled in relevant part after the Rehabilitation Act. See Davoll v. Webb, 943 F.Supp. 1289, 1297-98 & n.4 (1297) (D.Colo. 1996); see also Petersen v. University of Wis. Bd. of Regents., 818 F.Supp, 1276, 1278-79 (W.D.Wis. 1993) (Department of Justice regulations interpreting Title II of the ADA state that a plaintiff may proceed directly to federal court, and that exhaustion of administrative remedies is optional.). I agree with this conclusion. Therefore, exhaustion requirements do not apply to this case, and Defendant's Exhaustion Motion will be denied.

B. Substantive Claims - ADA

Title II of the ADA ("Public Services") provides in relevant part: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It is uncontested that Defendant is a public entity subject to suit under Title II. To establish a claim under the ADA, Plaintiff must demonstrate that: (1) she has a "disability," as that term is defined by the ADA; (2) she is a "qualified individual," as that phrase is defined by the ADA; and (3) the School of Medicine discriminated against her in its expulsion decision because of her alleged disability. See Zukle v. Regents of Univ. of Calif., 166 F.3d 1041, 1045

(9th Cir. 1999). Cf. Sutton v. United Airlines, Inc., 130 F.3d 893; 897 (10th Cir. 1997), aff'd, __ U.S. __, 119 S.Ct. 2139 (1999).

"Disability" is a term of art. See Poindexter v. Atchison, Topeka, and Santa Fe Ry. Co., 168 F.3d 1228, 1230 (10th Cir.1999). A "disability" under the ADA is: "(A) a physical or mental impairment that-substantially limits one or more of the major life activities of [the] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2); see 28 C.F.R. § 35.104; 28 C.F.R. pt. 36, app. B; see also Bragdon v. Abbott, 524 U.S. 624, ___, 118 S.Ct. 2196, 2202 (1998); Poindexter, 168 F.3d at 1230. Although claims of disability under subparagraphs (A), (B), or (C) are analyzed under separate frameworks, the three analyses share a common prong - whether the alleged impairment (actual, past, or imputed) "substantially limited" a "major life activity" of the individual. See 28 C.F.R. § 35.104; 28 C.F.R. pt. 36, app. B. "Substantially limited" and "major life activity" are both terms of art.

Assuming the impairment at issue here is Plaintiff's clinical depression and the "major life activity" at issue is Plaintiff's ability to learn or perform in an academic context, Plaintiff has failed to show that her depression "substantially limited" her in her ability to learn or perform academically. See McGuinness v. University of N.M. Sch. of Med., 170 F.3d 974, 978 (10th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1357 (1999). Plaintiff has failed to allege or offer any evidence that her clinical depression would impede her ability to attain an academic degree other than a M.D., or pursue a career other than as a physician. Plaintiff's

contentions about her clinical depression go only to the effect it had on her ability to perform as a medical student. "For purposes of the ADA, inability to pursue one career, such as medicine, does not constitute a severe impact on an individual's life." McGuinness, 170 F.3d at 979. Therefore, because Plaintiff is not disabled as that term is defined under Tenth Circuit law, I will grant Defendant's motion for summary judgment as to Count I of Plaintiff's Amended Complaint.

C. Substantive Claims - Rehabilitation Act

Section 504 of the Rehabilitation Act provides: "No otherwise qualified individual with a disability in the United States, as defined in [§ 705(20)] of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a). The Rehabilitation Act applies to public universities such as the School of Medicine. See id. § 794(b); see also McGuinness, 170 F.3d at 980. "Disability" is defined under the Rehabilitation Act in the same manner it is defined under the ADA. See McGuinness, 170 F.3d at 980 (citing Bragdon, 524 U.S. at ___, 118 S.Ct. at 2202, and Siemon v. AT &T Corp., 117 F.3d 1173, 1176 (10th Cir. 1997)). Consequently, Plaintiff's Rehabilitation Act claim fails, as a matter of law, for the same reason her Title II ADA claim fails - Plaintiff has not made any showing that her clinical depression precludes her from participating in federally funded programs other than medical school. See McGuinness, 170 F.3d at 980. Therefore, I will grant Defendant's motion for summary judgment as to Count II of Plaintiff's Amended Complaint.

IV. SECTION 1983 (COUNT III)

Defendant contends that I previously dismissed Count III, which alleges civil rights violations pursuant to 42 U.S.C. § 1983. This contention is inaccurate. I concluded that Defendant is not a "person" for purposes of awarding damages under § 1983, and I dismissed Count III only insofar as it sought an award of damages. However, I noted that in Count III, Plaintiff sought injunctive relief against Defendant in its official capacity for a violation of federal law, and that part of the claim was not dismissed. The injunctive relief sought by Plaintiff is readmittance to the School of Medicine.

Defendant moves for summary judgment on Plaintiff's request for declaratory and injunctive relief in Count III of the Amended Complaint. Because I conclude the School of Medicine did not violate Plaintiff's rights under the Due Process or Equal Protection Clauses, I will grant Defendant's motion.

A. Due Process

The Due Process Clause applies when government has deprived an individual of an interest in property or liberty. Because I conclude that the procedures used by the School of Medicine in dismissing Plaintiff fully met the narrow requirements of procedural due process in the educational context, I will assume both interests are present here. See Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 83-84 (1978) (issue not reached); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 222-23 (1985) (same).

1. Procedural Due Process

Defendant contends that Plaintiff received all the procedural process due her under the Constitution - notice, the opportunity to be heard, and a decision based on professional judgment. Plaintiff was notified by the Chair of the CSEP II that she was to be dismissed. Plaintiff and her therapist attended the CSPE II meeting, where reasons for her dismissal were discussed and Plaintiff was given an opportunity to respond and Dr. Carroll spoke on her behalf. Furthermore, the decision of the CSPE II was carefully reviewed on appeal by the Education Council and by the Dean of the School of Medicine, and affirmed both times.

Plaintiff responds that any notice she received about her impending dismissal or of the charges against her was inadequate and ambiguous, that she had an insufficient opportunity to be heard or show her side of the story, and that the decision to dismiss her was not made impartially or carefully. Regarding notice of faculty concern about her performance or conduct and that she was to be dismissed, Plaintiff alleges that after her readmittance to the School of Medicine she received no feedback that she was performing unsatisfactorily or was in danger of being dismissed. The feedback she received was positive and that her performance had improved. In fact, with exception of the contested OB/GYN rotation, she passed all her third year, rotations, receiving a grade of good in two of them. Furthermore, she was permitted to retake the OB/GYN exam she had failed, and was never informed that if she only marginally passed the exam she would be dismissed. As for the three minor incidents in July and August of 1996, Plaintiff was never informed that she had acted unprofessionally or that the

incidents would be grounds for dismissal. Additionally, Plaintiff was never informed that her cognitive and noncognitive performance before her leave of absence would be considered in the School of Medicine's evaluation of her after she returned. She was told only that she would be dismissed if she failed to pass her course work - and by passing all three components of the OB/GYN grade, she passed the rotation. Finally, in her meeting with Dr. Umland in November 1996 she was given no information regarding the grounds for her impending dismissal, she was not permitted to see her records, and her final OB/GYN grade was withheld from her.

Regarding the CSPE II meeting, Plaintiff contends that she was not given an opportunity to show her side of the story or question those who spoke against her, and she was not permitted to be represented by counsel. Only members of the OB/GYN faculty voiced concerns about her, and the majority of the concerns related to incidents that occurred before her leave of absence. As for the Education Council appeal, Plaintiff contends that she was given insufficient time to present the documents in her written packet or to present her arguments, and that the evidence against her was hearsay. Furthermore, it was not until the time of this appeal that she received her final OB/GYN rotation grade. The grade provided improperly in the form of a letter and stated incorrectly that she received a grade of satisfactory on a presentation when she had received a good. Additionally, while the Education Council notified her it was affirming her dismissal, its findings of facts prepared by the Chair were not provided to Plaintiff until she filed this lawsuit. The findings of fact, addressed to the University Counsel, stated that the OB/GYN Department's actions regarding the provision of

Plaintiff's final OB/GYN grade was "unconscionable" and placed the Education Council and the CSEP II in "an untenable position." Pl. Resp. Statement Mat. Facts, Exh. 2. The Education Council Chair also stated the OB/GYN Department should not have allowed Plaintiff to retake the OB/GYN written exam in October 1997 if it was not prepared to pass her if she successfully passed the exam. As for the review of Plaintiff's appeal by the Dean of the School of Medicine, Plaintiff contends that it was inadequate because the Dean was not an independent tribunal and because the decision was made *ex parte,* with no oral hearing.

Plaintiff further contends that under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g and 34 C.F.R. §§ 99.21-99.22, and the School of Medicine's Due Process Statement in the Student Handbook, she had a right to a full-blown hearing and a right to counsel and cross-examination.

The Supreme Court has enunicated two separate standards for reviewing due process claims in an academic context. If a student is dismissed from an educational institution for academic reasons, then: (1) the student must have been given prior notice of faculty dissatisfaction with her performance and the possibility of her dismissal; and (2) the decision to dismiss the student must have been careful and deliberate, i.e., a product of professional judgment. See Horowitz, 435 U.S. at 85. No hearing is required and extreme deference to the administrative decision must be given by the reviewing court. See id. at 85-89 & nn. 3 & 4. If a student is dismissed from an educational institution for disciplinary or misconduct reasons, the standard is more stringent: (1) the student must have had oral or written notice

of the charges; (2) if the student denied the charges, the student must have been given an explanation of the evidence the authorities had against her; and (3) the student must have been given an opportunity to present her side of the story. See id. at 85-86. While a dismissal for disciplinary purposes may call for a hearing, there is no requirement that a formal hearing be held or that the student be allowed representation by counsel or cross-examination of witnesses. See id. at 87, 88-89; see also Goss v. Lopez, 419 U.S. 565, 584 (1975) (all that is required is an "informal give-and-take" between the student and the administrative body). Furthermore, while the disciplinary dismissal standard is less deferential to school authorities than the academic dismissal standard, a degree of deference is still required. See Horowitz, 435 U.S. at 89.

Defendant contends that both academic and misconduct reasons for dismissal are present here. Because the Supreme Court advocates a flexible approach, I will apply both standards to this case.

Defendant has satisfied the two procedural requirements for an academic dismissal. School authorities may provide notice to the student in any form. See Gaspar v. Bouton, 513 F.2d 843, 851 (10th Cir. 1975). "All that is required is that the student be made aware prior to [dismissal] of [her] failure or impending failure to meet [academic] standards." Gaspar, 513 F.2d at 851. Plaintiff received such notice. Plaintiff knew generally of faculty dissatisfaction with her performance before and after her leave of absence. In the Student Evaluation given to Plaintiff for her first OB/GYN rotation in 1995, the OB/GYN Clerkship Director, Dr. George J. Gilsen, stated that not only had Plaintiff performed poorly in the rotation, cognitively and noncognitively, but

also that an assessment may be in order to see whether medicine was the most appropriate career choice for Plaintiff. Plaintiff was readmitted conditionally after her leave of absence and Plaintiff knew she had been placed on a watch list for academic and behavioral problems. Plaintiff also received comments from faculty during her 1996 rotations regarding problems with her performance, as is evidenced by Plaintiff's statements to Dr. Carroll during therapy sessions and by at least one evaluation form received by Plaintiff. Finally, in November 1996, Plaintiff was given notice by Dr. Umland that she would be dismissed. I conclude that, notwithstanding the alleged deficiencies in the notice provided Plaintiff by the School of Medicine, she received the minimal amount due. That the School of Medicine could have done more does not mean that it did not do enough under the Constitution.

The decision to dismiss Plaintiff by the School of Medicine was careful and deliberate. The initial decision maker, the CSEP II, heard faculty concerns at a meeting which Plaintiff and her therapist attended, and it made findings to support its decision to dismiss Plaintiff. The Education Council reviewed the CSEP II's decision on appeal. Additionally, the Dean of the School of Medicine met with Plaintiff and with individuals identified by Plaintiff, reviewed the minutes or transcript of the CSEP II meeting and Education Council appeal, and reviewed Plaintiff's medical school record. There is no indication that the decision to dismiss Plaintiff, either initially or on appeal, was made haphazardly or without thought or professional judgment. Although more procedure might have been desirable, all the procedural process required of Defendant was provided to Plaintiff.

Furthermore, even if the more stringent standard required for disciplinary dismissals is applied to this case, I still must conclude that Plaintiff was afforded the minimum procedural process due. She received notice of the charges, an explanation of the evidence the School of Medicine had, and an opportunity to present her side of the story both orally and/or through written documentation at the CSEP II meeting, in her Education Council appeal, and in her appeal to Dean Roth.

I decide, therefore, that under the narrow Supreme Court standards discussed above, no violation of Plaintiff's procedural due process rights occurred. While the School of Medicine's actions or omissions may support Plaintiff's state court breach of contract action, or an administrative claim under FERPA, they do not rise to the level of a constitutional procedural due process violation.

2. Substantive Due Process

A student's substantive due process rights may be violated if she was arbitrarily dismissed, or if in her dismissal there was such a substantial departure from accepted academic norms as to demonstrate that the school administrators did not actually exercise professional judgment. See Ewing, 474 U.S. at 225 (assuming existence of substantive due process right in school dismissal context); Horowitz, 435 U.S. at 956 (same); Harris, 798 F.2d at 424. The standard of review, however, is very narrow. See Van de Zilver v. Rutgers Univ., 971 F.Supp. 925, 934 (D.N.J. 1997). A lack of professional judgment is evidenced if the administrator's decision to dismiss the student was beyond the pale, capricious, or based on discrimination, ill-will, or bad

faith. See Ewing, 474 U.S. at 225-28. As I have stated earlier, the conduct of the School of Medicine may support Plaintiff's state court breach of contract claim. However, given the cognitive and noncognitive difficulties which the School of Medicine felt Plaintiff had, I am not compelled to find that the School of Medicine's dismissal of Plaintiff was done in bad faith, capriciously, or egregiously, or that the School's decision substantially departed from the academic norm. I further note that there is no due process requirement that a school's dismissal decision be correct, but only that it be properly rendered so as to reduce the risk of error. Therefore, because the School of Medicine's decision to dismiss Plaintiff was a product of professional judgment, Plaintiff's substantive due process claim fails.

B. Equal Protection

Plaintiff contends that her rights under the Equal Protection Clause have been violated by the School of Medicine in its decision to dismiss her. Plaintiff's claim lacks merit. Plaintiff has failed to demonstrate that she was treated differently from other similarly situated students. See Southern Disposal, Inc. v. Texas Waste Mgm't, 161 F.3d 1259, 1266 (10th Cir. 1998).

V. PLAINTIFF'S MOTIONS

Plaintiff's Motion for Default Judgment will be denied. Defendant was not required to file an amended answer to Plaintiff's Amended Complaint. The Amended Complaint was ordered by this Court, and was necessary only so that Plaintiff could list the true name of Plaintiff. Plaintiff's Contested Motion to Prohibit Defendant from Calling

Witnesses will be denied as moot, given the Court's rulings in this Opinion on Defendant's motions for summary judgment.

NOW THEREFORE IT IS ORDERED that Defendants' Motion for Summary Judgment for Failure to Exhaust Administrative Remedies, filed April 9, 1999 [Doc. No. 31], is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment Dismissing Counts I and II of the Complaint, filed April 26, 1999 [Doc. No. 37], is GRANTED. Summary Judgment will be entered in connection with this Order.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment on Plaintiff's Request for Declaratory and Injunctive Relief, filed April 26, 1999 [Doc. No. 41], is GRANTED. Summary Judgment will be entered in connection with this Order.

IT IS FURTHER ORDERED that Plaintiff's Motion for Default Judgment, filed June 29, 1999 [Doc. No. 59], is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Contested Motion to Prohibit Defendant From Calling Witnesses, filed July 15, 1999 [Doc. No. 68], is DENIED as moot.

/s/_____
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

34 C.F.R. 99.21

Sec. 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate,

(b) (1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b) (2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

APPENDIX E

34 C.F.R. 99.22

Sec. 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by Sec. 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under Sec. 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.